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The New York Law Controlling the Dissemination of Obscene Materials to Minors

THE NEW YORK LAW CONTROLLING THE DISSEMINATION OF OBSCENE MATERIALS TO MINORS

The Supreme Court, in *Winters v. New York*,[1] declared a section of the New York Penal Law,[2] which was essentially aimed at the control of harmful materials to minors,[3] to be unenforceable because of its vagueness.[4] However, the Court did "recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency."[5] This marked the beginning of a long and futile effort by New York legislators to draft effective yet constitutionally acceptable legislation in this field.[6] The constitutionality of New York's most recent statute has not yet been decided.

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the meeting competition defense from subsequent violators. See Bigelow-Sanford Carpet Co., Trade Reg. Rep. (F.T.C.) ¶ 16800, at 21764 (Feb. 10, 1964) (dissenting opinion).); (3) strenuous efforts to secure voluntary compliance; or as a last resort, (4) shifting the responsibility for "policing" such violations to the Justice Department. Abby Kent Co., Trade Reg. Rep. (F.T.C.) ¶ 17310, at 22468-69 (Aug. 9, 1965). Whether intentional or not, these suggestions only demonstrate the rationality of the Max Factor approach. Voluntary compliance in highly competitive industries would be most difficult to obtain and preserve. The Trade Regulation Rule procedure, while eliminating the meeting competition defense, would still leave the administrative dilemma of enforcing the Commission's orders against thousands of firms. Passing responsibility to the Justice Department might solve the Commission's problem, but would not hasten the day when such unfair practices are ended.

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1. 333 U.S. 507 (1948).

2. N.Y. Sess. Laws 1941, ch. 925, § 1.

3. The statute made it a misdemeanor to possess, with intent to distribute, "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . . ." Ibid. See Winters v. New York, 333 U.S. 507, 520-21 n.1 (1948) (dissenting opinion).

4. Id. at 519-20.

5. Id. at 510. Such encouragement for state and local authorities to aim legislation at the protection of minors was reiterated by the Court in Jacobellis v. Ohio, 378 U.S. 184, 195 (1964), where, although finding a motion picture not to be obscene, the Court indicated that, had the conviction been based upon its exhibition to children, a different decision would have resulted.

6. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . ." Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This indicates that the basis of such state power is the right to perpetuation of the state rather than the protection of the individual, although it appears that the former is impossible without the latter. See Reynolds v. United States, 98 U.S. 145, 164-66 (1878), indicating that interference with matters of personal conscience, aside from its social implications, is without the scope of the law. But see Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963), indicating that the principle motivations behind such legislation are notions of morality. Cf. Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (dissenting opinion).

I. The Basic Assumption

There is no conclusive proof establishing a causal relationship between access to obscene materials and undesirable human behavior.[7] To date, the preponderance of research has been concerned with the effect of these materials on the immature,[8] the group which appears to be the major target of such works.[9] The belief in the existence of such a causal relationship has had a strong motivating influence on legislation in this field, most strikingly evidenced by the statutory enactments of two states[10] which provide that

> the publication, sale and distribution to minors of . . . photographs, [or] pamphlets . . . devoted to the presentation . . . of illicit sex, lust, passion, depravity, violence . . . are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state. [Therefore, the necessity of these laws] . . . is hereby declared as a matter of legislative determination.[11]

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7. But see Winters v. New York, 333 U.S. 507, 520 (1948), where the court stated: "Neither the states nor Congress are prevented . . . from carrying out their duty of eliminating evils to which . . . such publications give rise."

8. See Committee on Public Health, Salacious Literature, 39 N.Y. Acad. Med. Bull. 545 (1963).

9. There is substantial authority for the position that there is such a relationship. See generally St. John-Stevas, Obscenity and the Law (1956); Report of the New York State Joint Legislative Committee To Study the Publication and Dissemination of Offensive and Obscene Materials, N.Y. Leg. Doc. No. 83 (1964); Committee on Public Health, supra note 8; Fagan, Obscenity Control and Minors—The Case for a Separate Standard, 10 Catholic Law. 270 (1964); Green, Obscenity, Censorship, and Juvenile Delinquency, 14 U. Toronto L.J. 229 (1962); Pornography: The New Black Plague, 54 Nat'l Parent Teachers 20 (1959); Schmidt, A Justification of Statutes Barring Pornography From the Mail, 26 Fordham L. Rev. 70, 84 (1958).

For the position that no relationship exists, see Gerber, Sex, Pornography, and Justice 317-19 (1965); Mead, Sex and Censorship in Contemporary Society, in New World Writing 7 (3d Mentor Selection 1953); Legislative Memorandum No. 33 from Ayrch Neier, Executive Director, New York Civil Liberties Union, to Governor Rockefeller, May 24, 1965. See generally Kronhausen & Kronhausen, Pornography and the Law 337-38 (1959), where erotic literature is claimed to be a valuable source of fantasy outlet for a disturbed individual, and, therefore, the limitation of access to these materials would be more likely to bring about the result it was meant to discourage. See also A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 86 Sup. Ct. 975, 984 n.10 (1966) (concurring opinion); Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964).

10. N.J. Rev. Stat. § 2A:115-3.3 (Supp. 1965); N.Y. Pen. Law § 484-e.

11. Ibid. The wording of N.J. Rev. Stat. § 2A:115-3.3 (Supp. 1965) is, in essence, identical to the New York statute. Such an enunciation is designed to bring the control of these publications within the police power of the state by making a determination, through the legislative body, that failure to control them would involve a substantial threat to the safety of the community. Such a legislative determination is to be given great weight and raises a presumption of the validity of the statute. Gitlow v. New York, 268 U.S. 652, 668-71 (1925). That the welfare of the minor is sufficient ground for the exercise of the power to restrict speech appears to be a settled question. Cf. Dennis v. United States, 341 U.S. 494, 503-09 (1951), citing Prince v. Massachusetts, 321 U.S. 158 (1944).

In the most comprehensive study of this relationship,[12] findings developed through empirical investigations failed to reveal any definite evidence of the detrimental effect of this type of subject matter.[13] It was, however, concluded that

> we should accept legal controls which seek to prevent that kind of commercial distribution which in essence *multiplies the risks* we may incur when obscenity falls frequently and easily into the hands of the immature. Thus, we might condemn . . . obscenity . . . which is either intentionally aimed at youth . . . or which is carried on with reckless disregard of the quality of the audience whose patronage is solicited.[14]

It appears safe to say that materials of this type have at least a deleterious effect upon those sexually immature individuals who are already prone towards sexual instability. Since the great number of variables which are instrumental in personality development makes it unlikely that a strict empirical determination will ever be achieved, such legislation must be regarded as a preventive measure which, when all interests are balanced, is a necessary one.[15]

II. The Guidelines Are Drawn

A. *Vagueness and Scope*

In *Winters v. New York*,[16] the Supreme Court stated that the acts prohibited by an obscenity statute must be defined with sufficient clarity so that "men of common intelligence [will not] . . . be required to guess at the meaning of the enactment."[17] It was pointed out that the vagueness may result from confusion either as to the persons within the scope of the statute or as to the nature of the prohibited acts.[18] The nature of either or both of these aspects, it was observed, should be ascertainable from a reading of the statute's entire text or the materials dealt with.[19]

Furthermore, a statute will be held unconstitutional if its scope is found to be overly broad. In a case[20] subsequent to *Winters*, it was observed that the effect of a statute which made it a misdemeanor to sell to the public in general materials deemed harmful to a minor would be to "reduce the adult population . . . to reading only what is fit for children."[21] It was therefore held invalid as

12. See Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962).

13. Id. at 1035.

14. Id. at 1040-41. (Emphasis added.)

15. See People v. Richmond County News, Inc., 9 N.Y.2d 578, 582-84, 175 N.E.2d 681, 683-84, 216 N.Y.S.2d 369, 372-74 (1961).

16. 333 U.S. 507 (1948).

17. Id. at 515. (Footnote omitted.) The Court distinguished between words well understood through past usage (e.g., obscene and lewd) and such phrases as "massing stories to incite crime." Id. at 518.

18. Id. at 515-16.

19. Id. at 518.

20. Butler v. Michigan, 352 U.S. 380 (1957).

21. Id. at 383. See In re Louisiana News Co., 187 F. Supp. 241, 247-48 (E.D. La. 1960) (dictum).

being too broad in the scope of its restriction when viewed in light of the problem which it was designed to remedy.[22]

B. *What Is Obscene?*

The landmark decision in the field of obscenity is *Roth v. United States*.[23] While reiterating that "obscenity is not within the area of constitutionally protected speech or press,"[24] the Court noted that, for subject matter to be obscene, it must, to the average person applying contemporary community standards, have a dominant theme which, taken as a whole, appeals to the prurient interest.[25] It was reasoned that, since an obscene publication is utterly without any redeeming social importance, the state's interest in promoting social order outweighed any benefit which could possibly be derived from it.[26]

This criterion was subsequently refined by a holding which interpreted the test laid down in *Roth* as further requiring that the material go so "beyond the customary limits of candor" as to be patently offensive.[27]

The requisite appeal to the prurient interest, as enunciated in *Roth*, was clarified in a recent case[28] which held that the appeal need not be, in all cases, to the average member of the community as a whole. When it can be established that the primary target of the subject matter is a "clearly defined deviant sexual group,"[29] the "average person" envisioned by *Roth* is an average representative of that particular group rather than the general community.[30] Furthermore, the

22. 352 U.S. at 383. The statute was also challenged on the ground that whether a particular book was within its scope was to be determined by the reading of isolated passages, rather than the work as a whole, and that the test laid down to ascertain guilt was too vague. The Court chose not to examine these questions. Id. at 381-82.

23. 354 U.S. 476 (1957).

24. Id. at 485. See Winters v. New York, 333 U.S. 507, 510 (1948).

25. 354 U.S. at 489. This definition of obscenity was adopted by the Court from the definition laid down in Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

26. 354 U.S. at 484. This definition has been interpreted by the New York Court of Appeals as limiting that which is obscene to "hard-core" pornography. People v. Richmond County News, Inc., 9 N.Y.2d 578, 586-87, 175 N.E.2d 681, 685-86, 216 N.Y.S.2d 369, 375-76 (1961). This is, however, an overly stringent view. See Mishkin v. New York, 86 Sup. Ct. 958 (1966).

27. This was the view taken in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486-87 (1962), by Mr. Justice Harlan and Mr. Justice Stewart. Chief Justice Warren and Justices Brennan and Douglas, concurring in the result, made no reference to this matter. It was similarly ignored by Justice Clark, who dissented. Justices Frankfurter and White did not take part in the consideration of the case.

28. Mishkin v. New York, 86 Sup. Ct. 958 (1966).

29. Id. at 963.

30. Ibid. The Court pointed out that the concept of the "average person," as employed in Roth, was utilized for the negative purpose of rejecting the rule first promulgated in Regina v. Hicklin, [1868] L.R. 3 Q.B. 360. 86 Sup. Ct. at 964. This rule made the test of obscenity whether isolated passages tended to corrupt the morals of those into whose hands it might fall, thus making the criterion the effect on particularly susceptible persons. See United States v. Kennerley, 209 Fed. 119, 120-21 (S.D.N.Y. 1913); Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 53

average member of the deviant sexual group will be determined on the basis of the national group rather than by reference to any particular local sub-group.

As pointed out, obscenity is not entitled to the protection of the first amendment and is subject to state restriction, even though it has not been established that such material tends to induce anti-social behavior.[31] This is significant where the legislation aimed at minors is in the form of an obscenity statute[32] rather than a police power statute.[33] In the case of an obscenity statute, the material must first be proven to be obscene so as to take it out of the ambit of the first amendment. A police power statute, on the other hand, enumerates the proscribed materials rather than categorizes them as obscene, and, thus, the only proof required is that the material sold was of the type enumerated. However, such a statute would be vulnerable to attack on the ground that the proscribed materials were arbitrarily and unreasonably enumerated.

An obscenity statute utilizing a concept of "variable obscenity"[34] would eliminate the need for justification of the restriction, as is true of all obscenity statutes, without limiting the scope of the prohibited materials. Under such an approach, the totality of the subject matter deemed objectionable for exposure to a *particular group* would be classed as "obscene." This would have the dual benefit of finding the material obscene, while incorporating within the statute anything which could validly be enumerated in a police power statute.

New dimension was given to the *Roth* decision in *Ginzburg v. United States*.[35] Petitioner was convicted of violating a federal obscenity statute which prohibited using the mails to distribute "obscene" materials.[36] The prosecution, conceding that the subject matter in question might not be obscene, contended that it was clearly within the purview of what is "obscene" when examined in the context of its sale and publicity. Noting that the advertising of the publications was permeated with the " 'leer of the sensualist,' "[37] the Court reasoned that this whetted the prurient appetite of the reader to an extent sufficient to cause *him* to view the work as primarily catering to such a desire, notwithstanding its true

(1960). As noted by the Court in Mishkin, since the present "holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons [in addition to having to be the primary target group], it . . . avoids the inadequacy . . . of the Hicklin test." 86 Sup. Ct. at 964. (Footnote omitted.) (Emphasis omitted.)

31. Roth v. United States, 354 U.S. 476, 486-87 (1957).

32. E.g., N.Y. Pen. Laws § 1141 makes it a misdemeanor to disseminate any "obscene, lewd, lascivious, filthy, indecent, sadistic, mascochistic or disguisting book . . . ." A prerequisite to guilt under this statute is a finding that the material is obscene, etc.

33. E.g., N.Y. Pen. Law § 484-f makes it a misdemeanor to sell a comic book with a title containing the words "crime, sex, horror." Such a blanket restriction is enforced aside from any determination as to whether the subject matter is obscene; the subject matter need only contain the proscribed words in the title notwithstanding their nature or the context in which they are used.

34. Lockhart & McClure, supra note 30, at 77.

35. 86 Sup. Ct. 942 (1966).

36. 18 U.S.C. § 1461 (1964).

37. 86 Sup. Ct. at 946.

nature.[38] For similar reasons, it was felt that the presentation of the book drew undue attention to its offensive parts and, therefore, heightened its offensiveness.[39] It was therefore held that

> by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion. . . . .
> . . . [I]n *close cases* evidence of pandering may be *probative* with respect to the nature of the material in question and thus satisfy the *Roth* test.[40]

Respecting works of a marginal nature, *i.e.*, works other than hard-core pornography, which may, nevertheless, be of an obscene nature, the circumstances of their dissemination to the public become an important factor in determining whether they are obscene. The utilization of such considerations would seemingly create an endless flow of litigation, since every decision would be limited to the facts of the case and would not be res judicata respecting a later action involving the same material. However, this new consideration represents the first tangible guideline in an area overladen with ambiguous generalities.

C. *Scienter*

Scienter is an indispensable element of proof in a prosecution under any obscenity statute. This was enunciated by the Supreme Court a short time after its *Roth* decision in a case[41] in which the appellant was convicted of a violation of a Los Angeles city ordinance which made it illegal to be in possession of obscene materials in areas where minors were likely to congregate.[42] The ordinance, which contained no scienter requirement,[43] was declared invalid on the ground that the absence of such a requirement severely limits the public's access to many acceptable works by discouraging booksellers from stocking works with which they are not familiar.[44] Unfortunately, the Court chose not to explain what sort of mental element is requisite to a successful prosecution.[45]

38. Id. at 947.
39. Ibid.
40. Id. at 948, 949. (Emphasis added.) (Footnote omitted.)
41. Smith v. California, 361 U.S. 147 (1959).
42. Id. at 148 n.1.
43. Id. at 149.
44. Id. at 153. Noting the attempt to analogize the statute at bar to statutes and ordinances which dispose of such a requisite showing of knowledge, the Court observed that the case at hand involved the abridgment of a constitutionally guaranteed right; whereas, in cases of statutes involving pure foods, etc., there is no original constitutional inhibition against imposing prohibitions which must be overcome. Id. at 152.
45. "The circumstances may warrant . . . that he was aware of what a book contained, despite his denial. . . . We . . . do not pass today on . . . whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; [or] whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further . . . ." Id. at 154. In a concurring opinion, Mr. Justice Frankfurter noted that public welfare offenses are exceptions to the rule requiring a showing of mens rea in order to establish guilt. Id. at 162. A logical inference which may be drawn from this is that,

Thus again, it was made clear that the effective inhibition of a supposed evil is not by itself sufficient to make a statute acceptable, for, if it is any more encompassing than the realm of the legitimately prohibited, it is invalid.[40]

D. *The Community Standard*

It was not until some years after the test for obscenity was laid down that the Supreme Court chose to elaborate on the phrase "contemporary community standards." The community is, as the Court said in 1964,[47] the nation as a whole.[48] This, however, was mere dictum,[49] and, in view of the strong argument for a local standard voiced in the dissent,[50] it is unclear whether the standard referred to was meant literally as a national one, or merely as a state standard, as opposed to one varying with the particular community. In view of the Court's statement that "the question whether a particular work is obscene necessarily implicates an issue of constitutional law . . ."[51] which must ultimately be decided

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in the case of a statute specifically aimed at minors, such a requirement may not be necessary since the entire concept behind the use of a state's police power is that it is done in furtherance of the public welfare. Such a situation would be, to some extent, analogous to restrictions against the sale of liquor to minors. See Morissette v. United States, 342 U.S. 246, 256-60 (1952); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933). But see note 44 supra.

The problem of establishing the requisite intent under a statute aimed at the protection of minors would be particularly imposing where the sale is made through the mails. Assuming that it must be established that the defendant was aware that the customer was a minor, the likelihood of a conviction would be nil, in the absence of an initial solicitation by the defendant through channels primarily geared to reach an adolescent audience. If such an offer for sale were made via a channel of general communication, it would be virtually impossible to accurately ascertain the true age of the customer. Therefore, if a conviction for selling obscene materials to minors, based upon such a sale, could be sustained, the seller's only recourse would be to halt such advertisements altogether. This would have the effect of limiting material available to adults to that which is acceptable for children, a circumstance which is sufficient to invalidate the legislation. Butler v. Michigan, 352 U.S. 380 (1957).

46. The effect of such an overly broad statute has been described as burning down "the house to roast the pig." Id. at 383.

47. Jacobellis v. Ohio, 378 U.S. 184 (1964).

48. Id. at 195 (dictum).

49. Mr. Justice Brennan wrote the opinion of the Court, which was joined in by Mr. Justice Goldberg. Justices White, Black, Douglas and Stewart, concurring in the result, were silent on this issue. The utilization of a local standard would appear to be the much more logical approach in view of the enormous difficulty of establishing the existence of a national standard, particularly in a case where there was a divergence between the community and the national standards. See United States v. Klaw, 350 F.2d 155, 168 n.14 (2d Cir. 1965).

Utah has attempted to finally settle this problem by providing that the community is the state. Utah Code Ann. § 76-39-11 (Supp. 1965). For an excellent statement of some of the problems inherent in this question, see Ginzburg v. United States, 86 Sup. Ct. 942, 952 (1966) (Black, J., dissenting).

50. 378 U.S. at 200 (Warren, C.J., Clark, J., dissenting). Mr. Justice Harlan, also dissenting, made no reference to the standard.

51. Id. at 188.

by the Court, it seems likely that the standard they would apply would not be a state or local one.[52]

III. The Prior New York Law

Pursuant to the recommendations of a legislative committee,[53] a new article was added to the New York Penal Law in 1955.[54] This article[55] made it a misdemeanor to

> willfully or knowingly [give] . . . away . . . or [distribute] . . . commercially to any person under the age of eighteen . . . any pornographic motion picture . . . or any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality *or* which is obscene, lewd, lascivious, filthy, indecent or disgusting, *or* which consists of . . . nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain . . . .[56]

This statute, which was Section 484-h of the New York Penal Law, as interpreted, encompassed a broader scope of prohibited materials than section 1141 of the Penal Law,[57] which makes it a misdemeanor to sell obscene literature to anyone.[58] One court has held that the statute prohibited even materials[59] of bona fide literary merit.[60] This interpretation was adopted by the New York Court of Appeals,[61] as to that part of section 484-h which prohibited the sale

52. It is suggested that the possibility of federal legislation in this area is worthy of investigation. There is little doubt that such regulation could easily be justified via the federal government's power to regulate interstate commerce. It has already been established that the standard referred to in the federal obscenity statutes is a national one. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962). Such a statute would avoid pitfalls which are prevalent in state legislation.

53. 1955 N.Y. Leg. Manual 770. The Joint Committee on Comic Books, created in 1949, was renamed The Joint Legislative Committee To Study the Publication and Dissemination of Offensive and Obscene Material.

54. N.Y. Sess. Laws 1955, ch. 836.

55. The article contained four provisions, all of which were enacted into law. N.Y. Pen. Law § 484-e (declaring that exposure to obscene materials created a danger to the state); N.Y. Pen. Law § 484-f (prohibiting sales of comics containing certain words in their titles or dealing with certain subjects); N.Y. Pen. Law § 484-i (divisibility provision). Section 484-h, N.Y. Sess. Laws 1964, ch. 482, § 1, was found unconstitutional, People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 334, 258 N.Y.S.2d 392 (1965) (per curiam), and is no longer in effect.

56. N.Y. Sess. Laws 1955, ch. 482, § 1. (Emphasis added.)

57. People v. Finkelstein, 156 N.Y.S.2d 104 (Magis. Ct. 1955).

58. Id. at 107. The court pointed out that, while all materials which would fall within the scope of § 1141 of the Penal Law would be proscribed by the statute at bar, it does not necessarily follow that the converse is true. Id. at 108.

59. Material falling solely within the scope of the statute aimed at minors was not considered to be obscene, but merely material which the legislature deemed harmful to a youth (descriptions of illicit sex or sexual immorality, etc.).

60. People v. Finklestein, 156 N.Y.S.2d 104, 110 (Magis. Ct. 1955).

61. People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

of materials describing illicit sex or sexual immorality,[62] and, hence, this portion of the statute was held to be so broad and vague as to be unconstitutional. The court did, however, suggest that it was both desirable and possible to draft a statute which properly prohibited that which is obscene for minors although not obscene for adults.[63] Such a concept of "variable obscenity,"[64] although favored by the federal courts,[65] had, until this time, been rejected by the New York courts.[66]

It is noteworthy that a similarly worded Rhode Island statute[67] was held

62. Id. at 411, 201 N.E.2d at 15, 252 N.Y.S.2d at 434. "[N]or does this clause in the statute render it necessary to conviction that the material dealing with illicit sex or sexual immorality shall have been presented in a salacious manner . . . . [T]he only construction of which this statutory language is susceptible is that the subject of illicit sex or sexual immorality is not to be brought before the young by pictures or writings—scientific, fictional or otherwise . . . ." Id. at 415, 201 N.E.2d at 17, 252 N.Y.S.2d at 437-38. Pursuant to such a ruling, it appears clear that § 484-f, prohibiting the sale or distribution of comic books "the title or titles of which contain the words crime, sex, horror or terror or the contents of which is devoted to . . . methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence . . ." exists today only because the court has not had occasion to rule on its validity.

An example of legislation in this area which offers an acceptable solution to the problem is the Texas statute prohibiting the sale or distribution of any lewd, depraved, or corruptive comic book[s]. Tex. Pen. Code art. 527b, § 1 (Supp. 1965). "Lewd comic book" is defined therein as one depicting or portraying nudity, indecent exposure, or sexually suggestive activities. Tex. Pen. Code art. 527b, § 3(b) (Supp. 1965). "Depraved comic book" is defined as one "depicting sadism, any gruesome crime, or any form of sexual perversion, or containing profanity, obscenity, or filth." Tex. Pen. Code art. 527b, § 3(c) (Supp. 1965). A "corruptive comic book" is one "containing material designed to create sympathy for a criminal, promote distrust of law, teach methods of committing any crime, or material depicting evil triumphing over good, or scenes of excessive violence, or containing advertisements for the sale of nude pictures, sex instruction books, knives, guns, or gambling equipment." Tex. Pen. Code art. 527b, § 3(d) (Supp. 1965). Explicit exemptions are made for the factual reporting of current events, or matter used for religious, educational, or scientific purposes. Tex. Pen. Code art. 527b, § 4 (Supp. 1965). Such a statute, when coupled with a proper scienter requisite, would appear to remedy the flaws which the court of appeals found in the New York statute.

63. See People v. Bookcase, Inc., 14 N.Y.2d 409, 416-17, 201 N.E.2d 14, 18, 252 N.Y.S.2d 433, 438-39 (1964).

64. Lockhart & McClure, supra note 30, at 77.

65. See Jacobellis v. Ohio, 378 U.S. 184, 195 (1964); United States v. 31 Photographs, 156 F. Supp. 350, 358 (S.D.N.Y. 1957), 7 Kan. L. Rev. 216 (1958) (hard-core pornography sent to social scientists for study); Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (dissenting opinion); Roth v. United States, 354 U.S. 476, 495 (1957) (concurring opinion); Note, 34 Ind. L.J. 426 (1959).

66. People v. Fritch, 13 N.Y.2d 119, 125, 192 N.E.2d 713, 717, 243 N.Y.S.2d 1, 7 (1963); see Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 846-47 (1964).

67. R.I. Gen. Laws Ann. § 11-31-10 (Supp. 1965). The United States Supreme Court noted that this statute was a good example of properly drawn legislation aimed at the protection of minors. Jacobellis v. Ohio, 378 U.S. 184, 195 n.11 (1964).

valid by the highest court of that state,[68] which ruled that "the alternatives mentioned [in the statute] are nothing more than examples of what is obscene . . ."[69] and, therefore, the *Roth* standard of redeeming social importance applies to these materials as well.[70] While such an interpretation is a more satisfactory analysis of the legislative intent than that offered by the New York court,[71] it too appears to be incorrect. The disjunctive "or" between the prohibition of obscene materials and materials devoted to descriptions of illicit sex and sexual immorality clearly indicates a desire to limit the latter, notwithstanding the fact that they are not obscene by the standards laid down in *Roth*. The New York court was correct in its interpretation of the statute to this extent, but it should have noted, as the dissent pointed out,[72] that the statute envisioned only those materials which were presented in a salacious manner. It would appear, therefore, that, although the Rhode Island court found the statute constitutional, it arrived at this result for the wrong reason.

In *People v. Kahan*,[73] the New York Court of Appeals held former section 484-h[74] unconstitutional in its entirety[75] on the ground of vagueness. The court felt that new legislation was desirable and possible[76] since the statute, as drafted, was "remediable both in respect of its substantive definitions and in respect of scienter as to contents and the age of the customer."[77] The concurring[78] and dissenting[79] opinions pointed to the fact that it was unclear whether "obscene," as used in former section 484-h, had the same meaning as in the general obscenity statute.[80] Paradoxically, it was this very differentiation in the meaning of the word "obscene" when used in the context of a statute aimed specifically at minors which the majority of the Rhode Island court relied on to find that statute valid.[81] It would appear that the meanings of the word "obscene" as used

68. State v. Settle, 90 R.I. 195, 156 A.2d 921 (1959).

69. Id. at 200, 156 A.2d at 924. It appears that, if this were the function of the additional phrase, then this would constitute a different meaning of obscenity, and would, therefore, be invalid because of its vagueness. See People v. Kahan, 15 N.Y.2d 311, 313, 206 N.E.2d 333, 335, 258 N.Y.S.2d 391, 393 (1965) (concurring opinion).

70. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 86 Sup. Ct. 975, 979 (1966); Grove Press, Inc. v. Christenberry, 276 F.2d 433, 437-39 (2d Cir. 1960). These cases indicate that literary merit is evidence of social importance.

71. People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964).

72. Id. at 419, 201 N.E.2d at 19, 252 N.Y.S.2d at 441 (Burke, J., dissenting).

73. 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam).

74. N.Y. Sess. Laws 1964, ch. 482, § 1.

75. It will be remembered that the statute contained a divisibility provision which creates a presumption of divisibility, rebuttable by showing the true legislative intent. See Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

76. 15 N.Y.2d at 311-12, 206 N.E.2d at 334, 258 N.Y.S.2d at 392.

77. Id. at 312, 206 N.E.2d at 334, 258 N.Y.S.2d at 392. (Italics omitted.)

78. Id. at 314, 206 N.E.2d at 335-36, 258 N.Y.S.2d at 393-94 (Fuld, J., concurring).

79. Id. at 316, 206 N.E.2d at 336-37, 258 N.Y.S.2d at 395 (Burke, J., dissenting).

80. N.Y. Pen. Law § 1141.

81. State v. Settle, 90 R.I. 195, 198-99, 156 A.2d 921, 924 (1959).

in the New York statutes, were identical, for, had a difference been intended, the invalid clause which dealt with "illicit sex"[82] would have been mere surplusage: *all* undesirable materials would have fallen within the scope of "obscene" for minors.[83]

In an attempt to fill the void created by the holdings of the court of appeals,[84] the New York Legislature enacted, in 1965, two laws[85] designed to protect minors and meet the statutory standards set down by the courts.[86]

IV. The Present New York Law

A. *Section 484-h*

Section 484-h, while lowering the age of those who fall within its scope to seventeen years,[87] contains detailed definitions of the terms "nudity,"[88] "sexual conduct,"[89] "sexual excitement,"[90] and "sado-masochistic abuse."[91] The legislature chose to adopt the concept of variable obscenity,[92] evidenced by the definition of "harmful to minors" as meaning

> that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
> (i) predominantly appeals to the prurient, shameful or morbid *interest of minors*, and
> (ii) is patently offensive to prevailing standards in the *adult community* as a whole with respect to what is *suitable material for minors*, and
> (iii) is utterly without redeeming social importance *for minors*.[93]

82. N.Y. Sess. Laws 1964, ch. 482, § 1.

83. Similarly, the fact that the meanings were the same results in some repetition, for a conviction could be achieved under either statute. This, however, does not justify the inference that the meanings were different since it is probable that the statute was intended to be a comprehensive compilation of all those materials which could not be disseminated to minors.

84. See notes 57-81 supra and accompanying text.

85. N.Y. Pen. Law §§ 484-h, -i.

86. Memorandum of the Governor, in N.Y. Sess. Laws 2101 (McKinney 1965); Memorandum of Assemblyman Burton Hecht, 1965 Leg. Annual 307.

87. N.Y. Pen. Law § 484-h(1)(a).

88. "'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state." N.Y. Pen. Law § 484-h(1)(b).

89. "'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast." N.Y. Pen. Law § 484-h(1)(c).

90. "'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal." N.Y. Penn. Law § 484-h(1)(d).

91. "'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizare [sic] costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed." N.Y. Pen. Law § 484-h(1)(e).

92. See Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 77 (1960); text accompanying note 34 supra.

93. N.Y. Pen. Law § 484-h(1)(f). (Emphasis added.) In conformity with the express

This applies the Supreme Court guidelines for determining whether a particular work is obscene,[94] with the important qualification that the subject matter is to be appraised in view of its potential effect on minors. The statute itself makes it a misdemeanor to knowingly[95] sell or loan for monetary consideration any visual representation, printed matter, or sound recording of carefully described types[96] which is harmful to minors.[97]

Of the three criteria for determining harmfulness to minors, only the second, *i.e.*, whether the work is patently offensive in light of that which the adult community deems desirable for exposure to minors, can be established with lay testimony. The other two criteria, "appeal to the prurient interest" and the existence of "redeeming social importance" appear to envision expert testimony by those especially knowledgeable as to the unique problems and needs of this group,[98] the existence of which problems are the basis for such specialized legislation.[99] Nevertheless, these three criteria constitute a workable standard[100]

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language in Roth, it would be advisable to add language to this subdivision that the work "taken as a whole" must be "harmful to minors." See text accompanying note 25 supra.

94. See Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486 (1962); Roth v. United States, 354 U.S. 476, 488-89 (1957).

95. "'Knowingly' means having general knowledge of, or reason to know, or a belief or a ground for belief which warrants further inspection or inquiry of both:

"(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

"(ii) the age of the minor . . . ." N.Y. Pen. Law § 484-h(1)(g).

96. See N.Y. Pen. Law § 484-h(2), (4).

97. See text accompanying note 93 supra.

98. "Although it may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest . . . it would not seem impossible. . . . [T]he jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person . . . ." United States v. Klaw, 350 F.2d 155, 167 (2d Cir. 1965). (Citations omitted.) See United States v. One Carton Positive Motion Picture Film Entitled "491", 247 F. Supp. 450, 463 (S.D.N.Y. 1965); Smith v. California, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring); Model Penal Code § 207.10(2) & comment 12 (Tent. Draft No. 6, 1957); Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 846-47 (1964).

The Model Penal Code requires that before a concept of variable obscenity be applied there be a showing that the subject matter in question is directed primarily towards that group. Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957). Although such a showing is required by at least one state, S.C. Code Ann. § 16-414.1(a) (Supp. 1965), there is no such requirement under the New York statute.

99. See note 5 supra and accompanying text.

100. See Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486 (1962); United States v. Klaw, 350 F.2d 155, 167 (2d Cir. 1965). "A book can not be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 86 Sup. Ct. 975, 978 (1966). (Footnote omitted.) (Emphasis omitted.)

whose interrelationship concisely and logically evidences a single concept—obscenity.[101]

An interesting aspect of this apparent disparity among types of proof comes into focus when viewed within the framework of the statute's scienter requirements. The necessity of showing that the disseminator had actual or imputed knowledge of the "character," as well as the "content," of the subject matter presumably refers to knowledge of the material's harmfulness.[102] Within this "character" requirement, two basic factors must be established: that there is reason to know that the material is harmful to minors, and that it is in fact harmful to minors.[103] While the latter requires expert testimony, the former is most logically to be determined by an examination of the circumstances of the particular case. And, if the material has been found to be patently offensive, this burden of proof will also have been met.

The statute requires the inspection of any material which apparently merits, and which is "reasonably susceptible" to, an examination.[104] Such a qualification constitutes a major stride towards eliminating the danger of any "obscenity" statute—that it will tend to curtail the availability of materials simply because the vendor will not deal in works with which he is unfamiliar. Under section 484-h, the more blatantly offensive the material, the more warranted would be an inspection.[105] This represents a satisfactory balance between the interests of the individual bookseller and the community as a whole.

The statute provides that an honest mistake as to the age of the minor is a defense, provided that a bona fide attempt at its ascertainment was made.[106] The existence of this clause exclusively in reference to the age factor raises the inference that such a mistake as to the character and content of the subject

101. See text accompanying note 25 supra.

102. See text accompanying note 93 supra.

103. "[I]t seems desirable, indeed essential, that such appeal to someone be shown to exist. . . . Nor should it be sufficient merely that the disseminator or publicizer thinks such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator." United States v. Klaw, 350 F.2d 155, 166 (2d Cir. 1965). There does exist separate legislation aimed at the individual who advertises inoffensive materials as though they were obscene (although the advertiser is aware of their true nature). E.g., N.Y. Pen. Law § 1141(1), (2), which makes it a misdemeanor to issue an advertisement stating where one may purchase obscene materials or materials which purport to be obscene.

104. N.Y. Pen. Law § 484-h(1)(g).

105. See, e.g., People v. Schenkman, 20 Misc. 2d 1093, 1098-99, 195 N.Y.S.2d 570, 575-76 (Ct. Spec. Sess.), aff'd mem. sub nom. People v. Finkelstein, 12 App. Div. 2d 457, 207 N.Y.S.2d 389 (1st Dep't 1960), rev'd on other grounds, 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961), where a paperback book entitled "Queen Bee" was sold for a price of $5.00. The back cover contained the following: " 'A tale that is wider [sic] and more sizzling than a barrel of sly French novels. A Roman orgy is tame compared to some of the bedroom scenes.' " 20 Misc. 2d at 1098, 195 N.Y.S.2d at 576. For a discussion of some elements which are relevant in determining the existence of the requisite state of mind, see Mishkin v. New York, 86 Sup. Ct. 958, 965 (1966).

106. N.Y. Pen. Law § 484-h(1)(g)(ii).

matter would not be a defense. This is in keeping with a previous holding by the court of appeals that, "when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial."[107] This aspect of the problem has not yet been considered by the Supreme Court.[108]

Although it may be established that the subject matter was known to have a deleterious effect upon minors and was consciously sold to a minor, it would still be necessary, in order to sustain a conviction, to establish that it falls within one of the described areas of activity.[109] In view of this apparently over-restrictive limitation, the possibility of language indicating that such descriptions are an illustrative, rather than exhaustive, list of the types of restricted materials would increase the effectiveness of the legislation.[110] In adding such language, however, it must be borne in mind that inversely proportional to the scope of the prohibition is the statute's vulnerability to being declared unconstitutional because of its broadness or vagueness.[111]

B. *Section 484-i*

Section 484-i of the Penal Law, framed on the format of a police power statute rather than an obscenity statute,[112] makes it a misdemeanor to knowingly sell, lend, or give to a person "actually or apparently" under eighteen years of age, visual representations or books containing depictions of those activities described in section 484-h as "nudity," "sexual excitement," and "sexual conduct." As a prerequisite to criminal liability, it must be established that the material is presented in such a manner as to "exploit lust for commercial gain" *and* that it appeals to the lust of persons under eighteen years *or* to their curiosity as to the sexual differences between male and female.

Despite a clear indication by the court of appeals that knowledge as to the age of the minor is necessary,[113] there is no such scienter provision in this

107. People v. Winters, 294 N.Y. 545, 552, 63 N.E.2d 98, 101, remittitur amended mem., 294 N.Y. 979, 63 N.E.2d 713 (1945), rev'd on other grounds, 333 U.S. 507 (1948).

108. See note 45 supra. It appears, however, that, since a work must be patently offensive in order to be obscene, there is little likelihood that a bona fide mistake as to its nature could be established.

109. See text accompanying note 93 supra.

110. See Fagan, Obscenity Control and Minors—The Case of a Separate Standard, 10 Catholic Law. 270, 282 (1964).

111. See notes 16-22 supra and accompanying text.

112. The prohibition of sales "to a person actually or apparently under the age of eighteen years . . ." N.Y. Pen. Law § 484-i, is practically an exact prototype of the N.Y. Alco. Bev. Control Law § 65(1), which imposes strict liability for the sale of alcoholic beverages to such a person. Ross's Dairies, Ltd. v. Rohan, 10 App. Div. 2d 987, 202 N.Y.S.2d 807 (2d Dep't) (memorandum decision), appeal denied mem., 11 App. Div. 2d 714, 205 N.Y.S.2d 883 (2d Dep't 1960).

113. In People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam), the court declared the predecessor to § 484-h to be unconstitutional, one of the grounds for such holding being that there was no scienter requirement as to the age of the person.

section. This deficiency, however, is overshadowed in light of the other serious defects in the statute's construction.

All subject matter within the scope of section 484-i must be presented in such a manner as to "exploit lust for commercial gain."[114] This language directly parallels that used in the predecessor[115] of what is now section 484-h, which was declared unconstitutional because of its vagueness.[116] This is to be contrasted with the second characteristic of the prohibited materials, which is appeal to the lust of those under the age of eighteen years or appeal to their curiosity as to the differences between the sexes.

The "appeal to lust" test, in light of the "commercial gain" test, indicates that, in addition to appealing to the lust of a minor, the material must have been disseminated with this intent. This "intent" requirement appears to be unconstitutionally broad and vague. First, some materials recognized as genuine works of art could be exploited for their lustful elements. Secondly, material in the "gray area" may fall within the purview of the statute depending upon whether the intent to exploit lust is deemed a subjective or an objective one. These considerations, in addition to the fact that a statute containing similar language has been held previously to be invalid,[117] underscore the deficiencies of this clause.

The third requirement of section 484-i is that the material be concerned with

114. N.Y. Pen. Law § 484-i(1)-(3).

115. N.Y. Sess. Law 1964, ch. 482, § 1. This statute used the phrase: "posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain . . . ."

116. People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam). Although this was a per curiam decision which held the entire statute invalid because of its defects in substantive definitions and scienter requirements, it may be assumed that the particular phrase in question was within the scope of the court's criticism. See Brief for Appellant, pp. 4-5, People v. Tannenbaum, Index No. B 6770, N.Y. App. T., March 3, 1966. While the concurring and dissenting opinions focused their attention on the problem of a possible dual meaning of the word "obscene," if this were the only problem, it could have been resolved by severing that particular portion (which was merely connected by the disjunctive "or"), rather than by declaring the entire statute invalid. Both the majority and concurring opinions made blanket references to the statute when stating that there was a lack of requisite clarity.

The Court, in Ginzburg v. United States, 86 Sup. Ct. 942 (1966), employed language similar to that appearing in N.Y. Pen. Law § 484-i, when it said that "an exploitation of interests in titillation by pornography" may be shown. Id. at 950. However, this judicial declaration cannot be used to prove the constitutionality of similar language which is utilized in § 484-i. The Court's statement constitutes a new guideline for determining what is "obscene," a concept which has already been held sufficiently clear for use in a statutory enactment. Winters v. New York, 333 U.S. 507, 518 (1948). Furthermore, this guideline is to be used solely in reference to the circumstances surrounding the sale and publication of the materials. The language utilized in § 484-i, on the other hand, refers to the nature of the materials themselves. The mere similarity in language, used in two completely different contexts, lends no credence to the argument that the language of § 484-i is not overly broad or vague.

117. People v. Kahan, supra note 116.

the various forms of sexual activity described therein. This is indicative of a legislative intent to give the individual a practical and workable description of exactly what materials are proscribed. This has not been achieved. The use of the conjunction "and" to connect all three criteria renders it impossible to construe the described acts as being merely illustrative of that which is designed "to exploit lust for commercial gain"; rather, it is a separate criterion.[118] When read in conjunction with the other criteria, the vagueness of the statute still poses a threat to its constitutionality.

Aside from the questions of vagueness, the prohibitions against the distribution of materials appealing to the minor's "curiosity as to sex or to the anatomical differences between the sexes"[119] is of more than passing interest. Assuming *arguendo* that all of the requisites of the statute are valid and have been complied with, it is extremely difficult to conceive of any court ever upholding this prohibition. Although it may be argued that this "curiosity" test requires that the material be presented in a salacious manner, such a construction appears to be very unlikely, particularly in view of the penchant of the New York Court of Appeals for extremely literal interpretation of this type of legislation.[120] There is, in fact, a very strong inference that *visual* materials need not be presented in a salacious manner in order to fall within the scope of section 484-i, since the statutory language that the proscribed works "are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks . . ."[121] appears solely in reference to books and pamphlets. Aside from the "lust for commercial gain" test, such works as Rodin's Cupid and Michelangelo's Sistine Chapel meet all of the tests of the prohibited works.[122] Because of the vagueness of the commercial gain test, the danger of suppressing constitutionally protected material is inherent within the statute.

It appears, therefore, that the statute is defective as to its scienter requirements,[123] it is too vague,[124] and it has the effect of prohibiting a much greater scope of materials than is necessary.[125] Those portions which are unsatisfactory go so directly to the heart of the statute that it would appear to call for total invalidation, notwithstanding the existence of a divisibility provision.[126]

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118. See note 116 supra.

119. N.Y. Pen. Law § 484-i(1)-(3).

120. See text accompanying notes 61-63 supra.

121. N.Y. Pen. Law § 484-i(3).

122. See Legislative Memorandum No. 33 From Aryeh Neier, Executive Director, New York Civil Liberties Union, to Governor Rockefeller, May 24, 1965.

123. See notes 41-46 supra and accompanying text.

124. See text accompanying notes 16-19 supra.

125. See text accompanying notes 20-22 supra.

126. Such a situation is analogous to that posed in Williams v. Standard Oil Co., 278 U.S. 235 (1929), in which the validity of a state statute fixing prices for the sale of gasoline was challenged. The act contained a separability provision providing that, if one section of the act were held invalid, it was not to effect any other sections of the act. In holding the

V. Conclusion

In section 484-h, New York has enacted what is essentially the best legislation ever passed in this field.[127] The statute is broader in scope than section 484-i, particularly since it establishes some control over the admission of minors to movies or shows of the type which the legislature has deemed objectionable.[128] The clause applicable to movies and shows makes it a misdemeanor to knowingly admit a minor to a show or movie which "in whole or in part" depicts the prohibited activities and which is harmful to minors.[129] Such a restriction is particularly desirable in light of the recent Supreme Court decision[130] holding unconstitutional the section of New York's Education Law which provided for the licensing of motion pictures.[131] These mass media have a significantly greater

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separability provision to be ineffective, the Court reasoned that the rest of the act constituted "mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution." Id. at 243. Therefore, since the statute was enacted to accomplish the single purpose indicated in the title, the entire act was invalid.

127. Compare Cal. Pen. Code § 311.3; Conn. Gen. Stat. Rev. § 53-244 (1958 and Supp. 1963); Del. Code Ann. tit. 11, § 435 (1953); Ga. Code Ann. § 26-6301.1 (Supp. 1965); Iowa Code § 725.8 (1962); Md. Ann. Code art. 27, § 4183 (Supp. 1965); N.J. Rev. Stat. § 2A:115-3.2 (Supp. 1964); N.D. Cent. Code § 12-21-07 (1960); Ohio Rev. Code Ann. § 2905.02 (Page 1964); Pa. Stat. Ann. tit. 18, § 3831 (1963); Utah Code Ann. § 76-39-5(6) (Supp. 1965).

128. N.Y. Pen. Law § 484-h(3).

129. Ibid.

130. Trans-Lux Distrib. Corp. v. Board of Regents, 380 U.S. 259 (1965) (per curiam), reversing 14 N.Y.2d 88, 198 N.E.2d 242, 248 N.Y.S.2d 857 (1964) (reversing order), 14 N.Y.2d 722, 199 N.E.2d 165, 250 N.Y.S.2d 67 (amending remittitur).

131. N.Y. Sess. Laws 1927, ch. 153, § 122. The issue of prior restraints in relation to motion pictures, i.e., the requirements that they meet certain standards before release to the public, was presented to the Supreme Court in 1961, the sole issue being whether the basic authority for the imposition of such requirements was valid. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). In a 5-to-4 decision, it was held that the imposition of prior restraints was not, in all circumstances, invalid. The Court, however, did not examine the requisite characteristics of an acceptable law of this type, although, in a later case, it was made clear that any such law bears "a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Exactly what criteria are to be utilized in the determination of the validity of a particular statute was recently indicated by the Court when the validity of a Maryland statute requiring all films to be approved by a Board of Censors before display to the public was struck down. In summarizing the findings of the Court, Mr. Justice Douglas, in a concurring opinion, stated: "The Court . . . holds that a system of movie censorship must contain at least three procedural safeguards . . . (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured." Freedman v. Maryland, 380 U.S. 51, 61-62 n.* (1965). Accord, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (upholding New York statute authorizing seizure of "obscene" books). That the requirements laid down in the Freedman case may be met without rendering the legislation ineffective is indicated by the recent approval, in dictum, of the Maryland statute as amended subsequent to the Freedman case. United States v. One Carton

audience than do books and, from all indications, have an extremely more profound effect upon the minds of the impressionable.[132]

The scienter requirement of section 484-h is basically a satisfactory one, with the exception that it makes a "general knowledge" or a "belief" a sufficient basis for imputing knowledge. In view of the fact that this is a criminal statute of a type which, at its best, potentially restricts the exercise of a consitutionally guaranteed right,[133] it appears that the knowledge required to sustain a conviction should be considerably more specific.[134] Actual knowledge need not be shown, but that which is deemed sufficient to put a disseminator on notice must be greater than that which is ordinarily sufficient as a basis for imputing knowledge.

While many obscenity statutes prohibit the exhibition of certain materials in places frequented by minors,[135] there is no such provision in either section 484-h or 484-i. Such a provision appears to be invalid in view of the fact that it would result necessarily in the deprivation of materials which are unobjectionable for adults, since these materials could not be displayed in any places frequented by minors. This is in direct contravention of the rule laid down in *Butler v. Michigan*.[136] There exists in New York a statute under the article concerned with indecency,[137] which prohibits exhibitions tending to "demoralize the morals of youth" in a public place. The peculiar location of this statute in the Penal Law is apparently the result of a mere oversight by the legislature. However, its apparent invalidity should not affect the validity of section 484-h.

Positive Motion Picture Film Entitled "491", 247 F. Supp. 450, 456 (S.D.N.Y. 1965). For a general discussion of the problems connected with motion picture censorship, see Schumach, The Face on the Cutting Room Floor (1964); Bilgrey, Some Questions Concerning Movie Censorship and the First Amendment, 18 Record of N.Y.C.B.A. 32 (1963); McAnany, Motion Picture Censorship and Constitutional Freedom, 50 Ky. L.J. 427 (1962); Verani, Motion Picture Censorship and the Doctrine of Prior Restraint, 3 Houston L. Rev. 11 (1965).

132. "Television's moving image accompanied by speech has a much more powerful and immediate effect than the comic book picture with its printed text. Television is infinitely more life-like and suggestive, and the emotional reactions to it are therefore stronger. . . . A healthy child who is immune to the influence of a strong emotional experience, whether created by reality or by fiction, does not exist." Mosse, The Influence of Mass Media on the Mental Health of Children, NAFBRAT Quarterly (Summer 1963), quoted in Report of the New York State Joint Legislative Committee To Study the Publication and Dissemination of Offensive and Obscene Material, N.Y. Leg. Doc. No. 83, p. 49 (1964).

133. See notes 41-45 supra and accompanying text.

134. In People v. Shapiro, 6 App. Div. 2d 271, 177 N.Y.S.2d 670 (2d Dep't 1958), a showing that defendants, who had experience in distributing magazines, removed books from cartons and rewrapped them prior to delivery to newsstands, and made a casual inspection of covers which were clearly indicative of material of a harmful nature, was sufficient to overcome a claim of ignorance of the nature of the subject matter. A careful reading of the case indicates, however, that, except in extreme cases, merely glancing at the cover is not sufficient to put the bookseller on notice.

135. E.g., Conn. Gen. Stat. Rev. § 53-244(b) (1958); Iowa Code § 725.3 (1962); Mont. Rev. Codes Ann. § 94-3601(1) (Supp. 1965).

136. 352 U.S. 380 (1957).

137. N.Y. Pen. Law § 1141-a.

It appears, therefore, that, aside from the addition of a separability clause such as that utilized in section 484-i, and minor changes as to the scienter requirements, and language making the list of prohibited materials illustrative rather than exhaustive, New York has finally enacted an effective and a constitutionally valid statute. While legislation of this type, in the absence of effective industry self-regulation such as has been attained to a great extent in the comic book industry,[138] is necessary, it must be carefully drafted so as to avoid the infringement of constitutionally protected rights. It is the reconciling of these apparently adverse interests which, until the present, has proven a true statutory enigma.

138. The Comics Magazine Association of America is a voluntary, self-regulatory organization to which nearly all publishers belong. Its influence in controlling this area of the obscenity problem has been most effective. See Report of the New York State Joint Legislative Committee To Study the Publication and Dissemination of Offensive and Obscene Material, N.Y. Leg. Doc. No. 83, p. 48 (1964); Note, 68 Harv. L. Rev. 489 (1955). North Dakota requires a trial court to give "due weight" to approval by this organization. N.D. Cent. Code § 12-21-07 (1960).